Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DAVID L. SMITH,

Petitioner,

v.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether Mr. Smith was "in custody" for purposes of filing his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254 attacking on federal constitutional grounds the Colorado Supreme Court's (March 3, 1997) opinion indefinitely suspending him from the practice of law in the State of Colorado.

Whether by issuing his (March 11, 1998) order dismissing Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254 without holding a hearing or addressing the issues raised and argued by him therein, Judge Daniel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law, including his due process right to a fair and impartial decision-maker.

Whether Judge Daniel also deprived Mr. Smith of his First Amendment right to access to the courts to petition the government for a redress of grievances.

Whether by issuing its (June 19, 1998) order affirming Judge Daniel's dismissal of Mr. Smith's Petition for a

Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254 without addressing the issues raised and argued by him in his Verified Response to Order to Show Cause; Motion for Issuance of Certificate of Appealability; and Motion for an Emergency Stay of the Opinion Issued by the Colorado Supreme Court on March 3, 1997 Indefinitely Suspending Mr. Smith From the Practice of Law in the State of Colorado, the Tenth Circuit committed a blatant and egregious violation of his right to meaningful appellate review under 28 U.S.C. § 2253.

Whether the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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Smith v. Supreme Court of the State of Colorado, No. 98-D-100 (D. Colo.) (unpublished order dated March 11, 1998).

JURISDICTION

The orders sought to be reviewed were entered on June 19, 1998 and October 1, 1998. Rehearing of the Tenth Circuit's (June 19, 1998) order affirming the dismissal by Judge Daniel of Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254 was summarily denied by order dated October 1, 1998.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the Tenth Circuit's orders of June 19, 1998 and October 1, 1998 is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amend. I, U.S. Consti.

Amend. V, U.S. Consti.

28 U.S.C. § 2241

28 U.S.C. § 2253

28 U.S.C. § 2254

See the appendix to this petition for a writ of certiorari for the complete text of the constitutional provisions and statutes involved in the case.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

On November 29, 1993, the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit issued its order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals of sanction orders issued by the United States District Court for the District of Colorado in four federal civil rights cases, and for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the District Court. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994).

On March 3, 1997, the Colorado Supreme Court issued its opinion (effective June 6, 1997) reciprocally disciplining Mr. Smith based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order. See People v. Smith, 937 P.2d 724 (Colo.), cert. denied, ____ U.S. ____, 118 S.Ct. 158, 139 L.Ed.2d 103 (1997). In its (March 3, 1997) opinion, the Colorado Supreme Court accepted the recommendations of the

hearing board and hearing panel of the grievance committee of the Colorado Supreme Court that Mr. Smith should be suspended from the practice of law in the State of Colorado for nine months, and that prior to reinstatement, he must demonstrate that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted.

On March 11, 1998, United States District Judge Wiley Y. Daniel issued his order dismissing Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254 attacking on federal constitutional grounds the Colorado Supreme Court's (March 3, 1997) opinion indefinitely suspending him from the practice of law in the State of Colorado. Judge Daniel issued his (March 11, 1998) order of dismissal without holding a hearing or addressing the issues raised and argued by Mr. Smith in his petition for a writ of habeas corpus.

On June 19, 1998, the Tenth Circuit issued its order affirming the dismissal by Judge Daniel of Mr. Smith's Petition for a Writ of Certiorari Pursuant to 28 U.S.C. §§ 2241 and 2254 without addressing the issues raised and argued by him in his Verified Response to Order to Show Cause; Motion for Issuance of Certificate of Appealability; and Motion for an Emergency Stay of the Opinion

Issued by the Colorado Supreme Court on March 3, 1997 Indefinitely Suspending Mr. Smith From the Practice of Law in the State of Colorado.

On October 1, 1998, the Tenth Circuit issued its order summarily denying Mr. Smith's Petition for Rehearing and Suggestion for Rehearing En Banc.

II. ARGUMENT

In his (March 11, 1998) order of dismissal, Judge Daniel found and concluded that Mr. Smith was not "in custody" for purposes of filing his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254. However, "in custody" means that the petitioner is subject to "restraints not shared by the public generally." See Jones v. Cunningham, 371 U.S. 236, 240, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963); see also Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) (continuing government supervision is sufficient for this purpose); Olson v. Hart, 965 F.2d 940, 942-943 (10th Cir. 1992) (probation is sufficient); Zal v. Steppe, 968 F.2d 924, 926 (9th Cir.), cert. denied, 506 U.S. 1021 (1992) (case was not moot since attorney faced possible disciplinary action); DePompei v. Ohio Adult Parole Authority, 999 F.2d 138, 140 (6th Cir. 1993) (revocation of medical license is sufficient); Nakell v.

Attorney General of North Carolina, 15 F.3d 319, 323 (4th Cir.), cert. denied, 513 U.S. 866 (1994) (attorney released on own recognizance following contempt conviction was "in custody"); Oyler v. Allenbrand, 23 F.3d 292, 294 (10th Cir.), cert. denied, 513 U.S. 908 (1994) (possible use of conviction to enhance future sentence was sufficient adverse consequence); Santos v. Franklin, 493 F.Supp. 847 (D.C. Pa. 1980) (activation of reservist from ready reserve to active military satisfied jurisdictional requirement of "in custody").[1] In the

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[1]Even adverse collateral consequences of a conviction have been found to satisfy the "in custody" jurisdictional requirement. See Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Evitts v. Lucey, 469 U.S. 387, 391 n.4, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995) (presumption of collateral consequences is irrebuttable, even in misdemeanor cases); but see Maleng v. Cook, 490 U.S. 488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (per curiam) ("once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it"); Waldon v. Cowley, 880 F.2d 291, 292 (10th Cir. 1989) (civil collateral consequences not sufficient).

present case, Mr. Smith is being subjected to restraints not shared by the public generally, including an indefinite suspension from the practice of law in the State of Colorado, in violation of C.R.C.P. 241.7(2), which provides that

> Suspension is the temporary suspension by the Supreme Court of a lawyer's license to practice law in this state, subject to reinstatement as provided in C.R.C.P. 241.22(b). Suspension shall be for a definite period of time not to exceed three years.

Prior to reinstatement, Mr. Smith must demonstrate that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted--an impossible task considering the fact that he is still financially unable to pay the more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the District Court. Further, the federal judiciary has repeatedly refused to review, rehear, reconsider, amend, modify, vacate, or correct the harsh and unjustified sanctions and discipline imposed against Mr. Smith by the Tenth Circuit, the District Court and their disciplinary

panels.[2] These adverse consequences are the direct and proximate result of the Colorado Supreme Court's (March 3, 1997) opinion reciprocally disciplining Mr. Smith based on the Tenth Circuit disciplinary panel's (November 29, 1993) order indefinitely suspending him from the practice of law in the Tenth Circuit. It therefore follows that Mr. Smith was "in custody" for purposes of filing his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254, and that Judge Daniel committed reversible error by finding and concluding otherwise.

Furthermore, by issuing his (March 11, 1998) order dismissing Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254 without granting a hearing or addressing the issues raised and argued by him therein, Judge Daniel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a

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[2]On February 12, 1998, the Colorado Supreme Court issued its order summarily denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado despite the fact that it is impossible to comply with the Colorado Supreme Court's (March 3, 1997) opinion or to file with committee counsel the affidavit required by C.R.C.P. 241.22(b).

living, in violation of his Fifth Amendment right to due process of law, including his due process right to a fair and impartial decision-maker.[3] See Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117

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[3]On May 2, 1996, the three-judge disciplinary panel of the United States District Court for the District of Colorado issued its order "strongly" admonishing Mr. Smith for allegedly practicing law in the District Court in violation of its (February 10, 1995) suspension order, and threatening to cite him for contempt of court "if he continues to practice law in this District." This order was based on a complaint filed against Mr. Smith by United States District Judge Wiley Y. Daniel with the Committee on Conduct of the United States District Court for the District of Colorado. In his complaint, Judge Daniel alleged that Mr. Smith "apparently" represented his client in the District Court "notwithstanding the fact that he is unauthorized to practice law before this Court." On this basis, Judge Daniel alleged that "David L. Smith may have acted in an unprofessional manner." Judge Daniel could not be a fair and impartial decision-maker in the present case after filing his unsubstantiated complaint against Mr. Smith with the District Court Committee on Conduct.

(1968); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States

District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Dailey v. Vought Aircraft Co., 141 F.3d 224 (5th Cir. 1998) (in order to comply with Fifth Amendment due process of law, a court must, at minimum, follow its own rules relating to attorney discipline). Judge Daniel also deprived Mr. Smith of his First Amendment right to access to the courts to petition the government for a redress of grievances. See id.; see also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.),

cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972).

Under 28 U.S.C. § 2253, Mr. Smith had the right to receive meaningful appellate review of Judge Daniel's (March 11, 1998) order dismissing his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254. See Hohn v. United States, ____ U.S. ____, 118 S.Ct. 1969, ____ L.Ed.2d ____ (1998); see also Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("the obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996) ("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984) ("every party is entitled to a full, considered, and impartial review of the decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir.

1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997). Therefore, by issuing its (June 19, 1998) order affirming Judge Daniel's dismissal of Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254 without addressing the issues raised and argued by him in his Verified Response to Order to Show Cause; Motion for Issuance of Certificate of Appealability; and Motion for an Emergency Stay of the Opinion Issued by the Colorado Supreme Court on March 3, 1997 Indefinitely Suspending Mr. Smith From the Practice of Law in the State of Colorado,[4] the Tenth Circuit committed a blatant and egregious violation of his right to meaningful appellate review under 28 U.S.C. § 2253. See id.

III. CONCLUSION

The Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that

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[4]This document is reproduced in the appendix to this petition for a writ of certiorari, and is incorporated herein by reference for all purposes.

has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. For these reasons, Mr. Smith requests this Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and such other and further relief as may be just under the circumstances, including an order under 28 U.S.C. § 2106 reversing and vacating Judge Daniel's (March 11, 1998) order dismissing Mr. Smith's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254, and reversing and vacating the Tenth Circuit's (June 19, 1998) order affirming Judge Daniel's (March 11, 1998) order.

Respectfully submitted,

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PRO SE ATTORNEY-PETITIONER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Petitioner-Appellant,

v. No. 98-1107

SUPREME COURT OF THE
STATE OF COLORADO,

Respondent-Appellee.

ORDER
Filed June 19, 1998

Before TACHA, BALDOCK and MURPHY, Circuit Judges

David L. Smith appeals an order of the district court dismissing his petition brought pursuant to 28 U.S.C. §§ 2241 and 2254 for lack of subject matter jurisdiction. We affirm.

In the action filed below, Mr. Smith challenged his suspension from practice by the Colorado Supreme Court contending that the suspension violated his Constitutional rights. The district court concluded that because Mr. Smith is not in custody, that it lacked subject matter jurisdiction over his petition.

As a jurisdictional prerequisite an applicant must be in custody when the application for habeas relief is filed. Carafas v. LaVallee, 391 U.S. 234, 238 (1968); United States v. Bustillos, 31 F.3d 931, 933 (10th Cir. 1994). To support jurisdiction, Mr. Smith argues the collateral consequences of his suspension are the equivalent of being in custody. However, Mr. Smith does not cite to any cases, and, indeed there are none, which determine that suspension alone is sufficient to meet the "in custody" requirement.

Although disbarment is considered "quasi-criminal", In re Ruffalo, 390 U.S. 544, 551 (1968), and is costly for an attorney, In re Palmisano, 70 F.3d 483, 486 (7th Cir. 1995), it does not follow that one who has been disbarred is in custody for purposes of habeas proceedings. As noted by the district court, the fundamental purpose of both §§ 2241 and 2255 is to allow an "attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody."

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court
PATRICK FISHER, Clerk of Court

By:
Ellen Rich Reiter
Deputy Clerk/Appeals Expediter

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Petitioner-Appellant,

v.

No. 98-1107

SUPREME COURT OF THE
STATE OF COLORADO,

Respondent-Appellee.

ORDER
Filed October 1, 1998

Before TACHA, BALDOCK, and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By:
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 98-D-100

DAVID L. SMITH, Filed March 11, 1998

Petitioner,

v.

SUPREME COURT OF THE
STATE OF COLORADO,

Respondent.

ORDER OF DISMISSAL

Petitioner David L. Smith has filed a "Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254." For the reasons stated below, the petition will be dismissed pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Mr. Smith has been suspended from the practice of law in the State of Colorado. People v. Smith, 937 P.2d 724 (Colo.), cert. denied, 118 S.Ct. 158 (1997). He alleges that the Colorado Supreme Court decision to suspend him from the practice of law was based on a November 29, 1993, order by the United States Court of

Appeals for the Tenth Circuit indefinitely suspending him from the practice of law in the Tenth Circuit. See In re Smith, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 513 U.S. 807 (1994). The Tenth Circuit subsequently disbarred Mr. Smith from the practice of law. In re Smith, 76 F.3d 335 (10th Cir.), cert. denied, 117 S.Ct. 186 (1996). Mr. Smith contends that the Colorado Supreme Court violated his constitutional rights when it suspended him from the practice of law. As relief, he asks me to grant his petition and enter "an order reversing and declaring void ab initio the Colorado Supreme Court's (March 3, 1997) opinion rubber-stamping the Tenth Circuit's disciplinary panel's (November 29, 1993) order." Petition at 20.

Pursuant to Fed. R. Civ. P. 12(h)(3), I must dismiss this action if the court lacks subject matter jurisdiction. Subject matter jurisdiction may be raised sua sponte by the court at any time during the course of the proceedings. See McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1252 (10th Cir. 1988). "The party seeking to invoke the jurisdiction of the court must demonstrate that the case is within the court's jurisdiction." United States v. Bustillos, 31 F.3d 931, 933 (10th Cir. 1994). For the reasons stated below, I find that this action must be dismissed for lack of subject matter jurisdiction because Mr. Smith is not in custody. See Maleng v. Cook, 490 U.S. 488, 490 (1989).

The fundamental purpose of a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2254 is the same: "they are 'an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.'" McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811 (10th Cir. 1997) (quoting Preiser v. Rodriguez, 411 U.S. 475, 484 (1973)). The "in custody" requirement is designed to limit review "to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

Mr. Smith provides no authority that convinces me he is in custody for the purposes of either 28 U.S.C. § 2241 and 28 U.S.C. § 2254. He is challenging the validity of the Colorado Supreme Court order suspending him from the practice of law in the State of Colorado. However, even the most liberal definition of custody does not include an attorney who has been suspended from the practice of law because an attorney who has been suspended from the practice of law has not been subjected to a restraint on his liberty. Accordingly, it is

ORDERED that the "Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. §§ 2241 and 2254" and the action are dismissed pursuant to Fed. R. Civ. P.

12(h)(3) for lack of subject matter jurisdiction.

DATED at Denver, Colorado, this 11th day of March, 1998.

BY THE COURT:

WILEY Y. DANIEL
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Appellant,

v.

SUPREME COURT OF THE STATE OF COLORADO,

Appellee.

Filed April 15, 1998

Case No. 98-1107
(D.C. No. 98-D-100)
(Dist. of Colo.)

VERIFIED RESPONSE TO ORDER TO SHOW CAUSE; MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY; AND MOTION FOR AN EMERGENCY STAY OF THE OPINION ISSUED BY THE COLORADO SUPREME COURT ON MARCH 3, 1997 INDEFINITELY SUSPENDING MR. SMITH FROM THE PRACTICE OF LAW IN THE STATE OF COLORADO

Pro se attorney-appellant David L. Smith ("Mr. Smith") hereby files his verified response to order to show cause; motion for issuance of certificate of appealability; and motion for an emergency stay of the opinion issued by the Colorado Supreme Court on March 3, 1997 indefinitely suspending him from the practice of law in the State of Colorado:

I. STATEMENT OF THE CASE

On March 3, 1997, the Colorado Supreme Court issued its opinion (a copy of which is attached hereto as Exhibit 1) reciprocally disciplining Mr. Smith based on the order issued on November 29, 1993 by the three-judge disciplinary panel (composed of Seymour, Chief Judge, and Baldock and Brorby, Circuit Judges) of the United States Court of Appeals for the Tenth Circuit. In its (November 29, 1993) order, the Tenth Circuit disciplinary panel indefinitely suspended Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals of sanction orders issued by the United States District Court for the District of Colorado to the Tenth Circuit in four federal civil rights cases, and for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the District Court. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). In its (March 3, 1997) opinion (effective June 6, 1997), the Colorado Supreme Court accepted the recommendations of the hearing board and hearing panel of the grievance committee of the Colorado Supreme Court that Mr. Smith should be suspended from the practice of law in the State of Colorado for nine months, and that prior to reinstatement, he must demonstrate that all sanctions imposed

against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted.

On April 30, 1997, the Colorado Supreme Court issued its order (a copy of which is attached hereto as Exhibit 2) denying Mr. Smith's petition for a writ of habeas corpus without holding a hearing, addressing the issues and arguments raised by him therein, or giving any reasons for its decision.

On March 12, 1998, United States District Judge Wiley Y. Daniel issued his order of dismissal (a copy of which is attached hereto as Exhibit 3) dismissing Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 without holding a hearing or addressing the issues and arguments raised by him therein.

On March 25, 1998, Mr. Smith filed his notice of appeal of Judge Daniel's (March 12, 1998) order of dismissal.

On April 1, 1998, the United States Court of Appeals for the Tenth Circuit issued its order (a copy of which is attached hereto as Exhibit 4) requiring Mr. Smith to "show cause within 14 days of the date of this order as to why the district court order dismissing his petition for lack of subject matter jurisdiction should not be summarily affirmed."

II. ARGUMENT

In its (March 3, 1997) opinion, the Colorado Supreme Court declined to consider the merits of Mr. Smith's defenses to the allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint that he had been indefinitely suspended from the practice of law in the Tenth Circuit for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00. The Colorado Supreme Court said:

> In the first place, we do not read the court of appeals order as disciplining the respondent for failure to pay the sanctions imposed against him. The respondent was suspended for filing frivolous appeals, as set forth in the show cause order. After admitting at oral argument that he had not paid any of the sanctions imposed against him, however, the court of appeals made satisfaction of the sanctions he had been previously ordered to pay as a condition for reinstatement. See Smith, 10 F.3d at 724. One of the respondent's premises is therefore false.

However, this statement is not only inconsistent with the allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint; it is also inconsistent with the order issued

by the Tenth Circuit disciplinary panel on February 13, 1996, finding that "Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was filing frivolous appeals and failing to pay court ordered sanctions." [Emphasis supplied.] See In re David L. Smith, 76 F.3d 335 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 186, ____ L.Ed.2d ____ (1996). Further, this statement is inconsistent with the Findings of Fact and Recommendation of the Hearing Board, issued by the hearing board of the grievance committee of the Colorado Supreme Court on April 15, 1996, finding that "[i]n Count I of the Complaint it is alleged that on November 29, 1993, Respondent was suspended from the practice of law before the United States Court of Appeals for the Tenth Circuit for filing frivolous appeals in several matters and for failing to pay any part of the sanctions imposed upon him in the total amount exceeding $50,000.00 by the United States Court of Appeals and by the United States District Court for the District of Colorado." [Emphasis supplied.] Finally, this statement is inconsistent with the recommendation of the hearing panel of the grievance committee of the Colorado Supreme Court on August 10, 1996, adopting the Findings of Fact and Recommendation of the Hearing Board. Under these circumstances, it is clear that the Colorado Supreme Court incorrectly assumed that the Tenth Circuit disciplinary panel did not

discipline Mr. Smith for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00. It is also clear that by declining to consider the merits of Mr. Smith's defenses to this allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint, the Colorado Supreme Court convicted and punished Mr. Smith for what amounts to criminal contempt without affording him his right to a full criminal process, including his Sixth Amendment right to a jury trial.[5] See International Union v.

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[5]In its (March 3, 1997) opinion, the Colorado Supreme Court held that Mr. Smith was not entitled to a jury trial on the allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint that he had filed alleged "frivolous" appeals of District Court sanction orders to the Tenth Circuit. However, this holding is based on the false assumption that Mr. Smith took the position that he was entitled to a jury trial on this allegation. In point of fact, Mr. Smith did not take the position that he was entitled to a jury trial on this allegation. Mr. Smith did, however, take the position that he was entitled to a jury trial on the allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint that he had failed to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00.

Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994), quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767 (1925); Hicks v. Feiock, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988); and Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968). Finally, it is clear that the Colorado Supreme Court afforded Mr. Smith fewer constitutional rights merely because he was convicted and punished in attorney disciplinary proceedings rather than in criminal contempt proceedings, in violation of his Fourteenth Amendment right to the equal protection of the laws.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that Mr. Smith was not entitled to a due process evidentiary hearing before being disciplined in the federal proceedings and reciprocally disciplined in the state proceedings for filing alleged "frivolous" appeals of District Court sanction orders to the Tenth Circuit. However, this holding is contrary to the plain language and meaning of Fed. R. App. P. 46 and C.R.C.P. 241.14, both of which require an attorney charged with a disciplinary violation to be afforded an evidentiary hearing, the only substantial

difference between the two rules being that under the federal rule, the attorney must make a request for an evidentiary hearing, whereas no such request is required by the state rule.[6] See also In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985). Contrary to language in the Colorado Supreme Court's (March 3, 1997) opinion, the federal and state rules do not require an attorney charged with a disciplinary violation to make an offer of proof before being entitled to his or her due process right to an evidentiary hearing. Further, Mr. Smith was not permitted to make an offer of proof in the disciplinary proceedings before the Tenth Circuit disciplinary panel; and

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[6]Mr. Smith made at least two written requests for an evidentiary hearing in the proceedings before the Tenth Circuit disciplinary panel, but both requests were summarily denied--a blatant and egregious violation of Fed. R. App. P. 46.

denies that the offer of proof he made in the reciprocal discipline proceedings before the hearing board of the grievance committee of the Colorado Supreme Court was insufficient to show the relevance and necessity of the testimony of his witnesses, including his expert witnesses. In point of fact, Mr. Smith could not prove his defenses to the charges being brought against him in the federal and state disciplinary proceedings, and would therefore be convicted in those proceedings, in the absence of an opportunity to present the testimony of his witnesses, including his expert witnesses, at the hearings in those proceedings. Under these circumstances, the Colorado Supreme Court's holding that Mr. Smith was not entitled to a due process evidentiary hearing before being disciplined in the federal proceedings and reciprocally disciplined in the state proceedings condoned a result which was both predictable and incredibly unfair.[7]

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[7]This unfairness is underscored by the Findings of Fact and Recommendations of the Hearing Board (a copy of which is attached hereto as Exhibit 5) issued by another hearing board of the grievance committee of the Colorado Supreme Court on March 6, 1997, declining to reciprocally discipline Mr. Smith based on an order issued by the Supreme Court of the United States on November 27, 1995. In its (November 27, 1995) order, the U.S. Supreme Court disbarred Mr.

Smith from the practice of law in that Court for his failure to comply with an order to pay sanctions of $500.00 for filing an alleged "frivolous" petition for a writ of certiorari. In its (March 6, 1997) findings of fact and recommendations, the hearing board found and concluded that the U.S. Supreme Court had deprived Mr. Smith of his right to due process of law by disciplining him without affording him the evidentiary hearing required by Sup. Ct. R. 8. The hearing board's (March 6, 1997) findings of fact and recommendations are clearly inconsistent with the Colorado Supreme Court's (March 3, 1997) opinion holding that the Tenth Circuit disciplinary panel did not deprive Mr. Smith of his right to due process of law by disciplining him without affording him the evidentiary hearing required by Fed. R. App. P. 46. In this connection, it is significant to note that the hearing board permitted Mr. Smith to present the testimony of at least some of his witnesses, including his expert witnesses, before issuing its (March 6, 1997) findings of fact and recommendations declining to reciprocally discipline him. Under these circumstances, the hearing board's (March 6, 1997) findings of fact and recommendations underscore the unfairness to Mr. Smith of disciplining him and reciprocally disciplining him without affording him his due process right to an evidentiary hearing.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that the Tenth Circuit disciplinary panel had not deprived Mr. Smith of his Fifth Amendment due process right to fair notice of the charges being brought against him because he was given fair notice that he was being charged with filing alleged "frivolous" appeals in DeHerrera v. City and County of Denver and Casillan v. Regional Transportation District; and had not deprived Mr. Smith of his Fifth Amendment due process right to an adequate opportunity to be heard with respect to these charges before entry of a final judgment because he was given an adequate opportunity to file written responses to the Tenth Circuit disciplinary panel's orders to show cause why he should not be "fined, disbarred or otherwise disciplined" for filing alleged "frivolous" appeals in these cases before entry of a final judgment. However, Mr. Smith was also being charged with filing alleged "frivolous" appeals in Dunkin v. Louisiana-Pacific Corporation and Sandlin v. Corporate Interiors, Inc. Despite this fact, Mr. Smith was not given an adequate opportunity (or any opportunity) to file written responses to the Tenth Circuit disciplinary panel's orders to show cause why he should not be "fined, disbarred or otherwise disciplined" for filing alleged "frivolous" appeals in these cases before entry of a final judgment. Under these circumstances, the Colorado Supreme Court committed a grievous error by holding that the Tenth

Circuit disciplinary panel had not deprived Mr. Smith of his Fifth Amendment due process right to fair notice of the charges being brought against him, and had not deprived him of his Fifth Amendment due process right to an adequate opportunity to be heard with respect to these charges before entry of a final judgment.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that the proof upon which the Tenth Circuit disciplinary panel based its determination of misconduct by Mr. Smith (if any) is not so infirm that the Colorado Supreme Court cannot, consistent with its duty, accept as final the determination of the Tenth Circuit disciplinary panel. However, the only "proof" upon which the Tenth Circuit disciplinary panel based its determination of misconduct by Mr. Smith (if any) was that previous hearing panels of the Tenth Circuit had issued unpublished orders holding that he had filed alleged "frivolous" appeals of District Court sanction orders to the Tenth Circuit. At oral argument, the Tenth Circuit disciplinary panel ruled that Mr. Smith would not be permitted to argue that these appeals were not "frivolous" because this issue had already been determined against him by previous Tenth Circuit hearing panels, and that it had no authority to overturn decisions rendered by previous hearing

panels.[8] However, these rulings were contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel." [Emphasis supplied.] These rulings also prevented Mr. Smith from arguing that because there was a split in the federal circuits on the issue involved in his appeals, or because his appeals were good faith arguments for the extension, modification or reversal of existing law, or for the establishment of new law, the Tenth Circuit's unpublished orders sanctioning him for filing these alleged "frivolous" appeals were void ab initio. See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's

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[8]These rulings were confirmed by the Tenth Circuit disciplinary panel in its (November 29, 1993) order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994).

attorney was that his argument was foreclosed by circuit precedent).[9] Finally, these rulings created an irrebuttable presumption of guilt that deprived Mr. Smith of his Fifth Amendment right to due process of law. Under these circumstances, Mr. Smith did not have a full and fair opportunity (or any opportunity) to litigate the issue of whether his appeals of District Court sanction orders to the Tenth Circuit were "frivolous," and the Colorado Supreme Court committed a grievous error by holding that the proof upon which the Tenth Circuit disciplinary panel based its determination of misconduct by Mr. Smith (if any) is not so infirm that the Colorado Supreme Court cannot, consistent with its duty, accept as final the determination of the Tenth Circuit disciplinary panel.

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[9]The U.S. Supreme Court's decision in McKnight resolved the split in the federal circuits on the issue involved in Mr. Smith's appeals to the Tenth Circuit, and it is therefore no longer equitable that the Tenth Circuit disciplinary panel's (November 29, 1993) order disciplining him for filing these appeals should have prospective application. Despite this clarification of the law by the U.S. Supreme Court, the Tenth Circuit disciplinary panel continues to refuse to vacate its (November 29, 1993) disciplinary order against Mr. Smith.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that Mr. Smith had not been deprived of his due process right to a fair and impartial decision-maker in the federal and state disciplinary proceedings. However, it was reasonably questionable whether the Tenth Circuit disciplinary panel could be a fair and impartial decision-maker in disciplinary proceedings in which Mr. Smith was attempting to challenge the validity of unpublished court orders holding that he had filed alleged "frivolous" appeals of District Court sanction orders to the Tenth Circuit, and requiring him to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the District Court. See 28 U.S.C. § 455(a); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias

is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). It was also reasonably questionable whether the presiding officer of the hearing board of the grievance committee of the Colorado Supreme Court could be a fair and impartial decision-maker in reciprocal discipline proceedings in which he refused to accord Mr. Smith full right to be heard according to law, and then failed or refused to disqualify himself from the proceedings, in violation of Canon 3 of the Colorado Code of Judicial Conduct. The presiding officer also improperly combined trial and appellate functions by participating as presiding officer of the hearing board which heard the reciprocal discipline proceedings against Mr. Smith before participating as a member of the hearing panel of the grievance committee of the Colorado Supreme Court which reviewed and adopted the Findings of Fact and Recommendation of the Hearing Board. Finally, it was reasonably questionable whether the hearing panel could be a fair and impartial decision-maker in reciprocal discipline proceedings against Mr. Smith in which only six of nine members of the hearing panel participated in the action adopting the Findings of Fact and Recommendation of the Hearing Board. This dilution of participation by the

membership of the hearing panel clearly deprived Mr. Smith of his due process right to a fair and impartial decision-maker in the state disciplinary proceedings. Under these circumstances, the Colorado Supreme Court committed a grievous error by holding that Mr. Smith had not been deprived of his due process right to a fair and impartial decision-maker in the federal and state disciplinary proceedings.

In its (March 3, 1997) order, the Colorado Supreme Court held that the state disciplinary prosecutor and the presiding officer of the hearing board of the grievance committee of the Colorado Supreme Court had not deprived Mr. Smith of his Fifth Amendment privilege not to be a witness against himself by threatening to impose sanctions against him if he refused to submit to a deposition by the state disciplinary prosecutor. However, Mr. Smith took the position that he would waive his Fifth Amendment privilege not to be a witness against himself if he submitted to a deposition by the state disciplinary prosecutor, and sought to have this issue presented to the Colorado Supreme Court for resolution. Instead of following this procedure, the state disciplinary prosecutor and the presiding officer set Mr. Smith's deposition over his objection and threatened to impose sanctions against him if he refused to attend and give testimony. Under these circumstances, the state disciplinary

prosecutor engaged in prosecutorial misconduct; the presiding officer abused his discretion (if any) to threaten to impose sanctions against Mr. Smith; and Mr. Smith was deprived of his Fifth Amendment privilege not to be a witness against himself. See Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). It is very ironic that the presiding officer would threaten to impose sanctions against Mr. Smith if he refused to submit to a deposition by the state disciplinary prosecutor, while refusing to permit Mr. Smith to present the testimony of his witnesses, including his expert witnesses, in his own defense at the hearing set for that purpose.

In its (March 3, 1997) order, the Colorado Supreme Court held that "[b]ecause the respondent's reciprocal disciplinary proceeding was not a criminal proceeding for purposes of the Sixth Amendment right to a speedy trial, that right was not violated in this case." However, in People v. Smith, 773 P.2d 522 (Colo. 1989), the Colorado Supreme Court said:

> Given the continuing course of unprofessional acts, each of which required additional investigation by the Grievance Committee investigator and one of which occurred shortly before the grievance hearing, we are satisfied that there was no such delay in this case as to rise to the level of a due process violation or,

> for that matter, to result in any prejudice to the respondent.

See id. at 526-27, citing People v. Morley, 725 P.2d 510 (Colo. 1986). In the present case, a 270-day delay occurred between the date (November 29, 1993) on which the Tenth Circuit disciplinary panel disciplined Mr. Smith and the date (August 26, 1994) on which the state disciplinary prosecutor filed his reciprocal discipline complaint against Mr. Smith. An additional 377-day delay occurred between the date (September 15, 1994) on which Mr. Smith filed his answer to the reciprocal discipline complaint pleading not guilty to the charges being brought against him by the state disciplinary prosecutor and the date (September 27, 1995) on which he was brought to trial on those charges. During these unconscionable delays, Mr. Smith was unable to practice law and make a living because of the cloud hanging over his head, a cloud created by the reciprocal discipline proceedings pending against him. However, no part of these unconscionable delays was attributable to additional investigation of Mr. Smith's conduct by the state disciplinary prosecutor or his investigator. In fact, little or no investigation was conducted of Mr. Smith's conduct by the state disciplinary prosecutor or his investigator. If a proper investigation of Mr. Smith's conduct had been conducted, it would have been apparent that he had not engaged in any misconduct

for which discipline may be imposed. Under these circumstances, the unconscionable delays in the reciprocal discipline proceedings against Mr. Smith rise to the level of a Fourteenth Amendment due process violation for which the case should have been dismissed with prejudice.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that the imposition by the Colorado Supreme Court of the same discipline as was imposed by the Tenth Circuit disciplinary panel would not result in grave injustice to Mr. Smith because the punishment imposed by the Colorado Supreme Court would not be harsher than that imposed by the Tenth Circuit disciplinary panel. However, the punishment imposed by the Colorado Supreme Court is an indefinite suspension from the practice of law in the State of Colorado--a blatant and egregious violation of C.R.C.P. 241.7. Further, it is impossible for Mr. Smith to comply with the conditions for reinstatement recommended by the hearing board and hearing panel of the grievance committee of the Colorado Supreme Court that he be required to "demonstrate that all sanctions imposed by the Tenth Circuit and the U.S. District Court have been satisfied and that all federal suspensions have been lifted." One of the reason for this is that the Tenth Circuit has held, in another unpublished opinion, that the harsh and unjustified sanctions of more than $25,000.00

previously imposed against Mr. Smith by United States District Judge Edward W. Nottingham in Dunkin v. Louisiana-Pacific Corporation must still be paid by him, even though these sanctions have already been paid as a part of the consideration for the settlement of Dunkin by the parties and their attorneys. However, Mr. Smith is still financially unable to pay these or the remainder of the harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the District Court; and he will be unable to demonstrate that all federal suspensions have been lifted unless he is able to demonstrate that these sanctions have been paid.[10] Finally, it clearly violates the due process and equal protection

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[10]As a part of his efforts to persuade the Tenth Circuit and its disciplinary panel to review, reconsider and correct the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, Mr. Smith submitted affidavits and other evidentiary materials showing that he is financially unable to pay all or any part of the more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the District Court. At the time of the submission of these evidentiary materials, Mr. Smith had a negative net worth of more than $360,000.00. Currently, Mr. Smith has a negative net worth of more than $400,000.00. Due to his indefinite

clauses of the Fourteenth Amendment to the Constitution of the United States for the Colorado Supreme Court to condition Mr. Smith's right to practice law in the State of Colorado on his payment of these harsh and unjustified sanctions, the validity of which are still being litigated by him in the federal courts. Under these circumstances, imposition by the Colorado Supreme Court of the same discipline as was imposed by the Tenth Circuit disciplinary panel has resulted in grave injustice to Mr. Smith; and the misconduct proved (if any) warranted that a substantially different form of discipline (including no discipline) be imposed by the Colorado Supreme Court.

By issuing its (April 30, 1997) order denying Mr. Smith's petition for a writ of habeas corpus without holding a hearing, addressing the arguments raised by him therein, or giving any reasons for its decision, the Colorado Supreme Court deprived him of his right to have its (March 3, 1997) opinion reviewed for constitutional defects, in violation of his First Amendment right to petition the government for a redress of grievances and his Fourteenth Amendment right to due

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suspension from the practice of law in the federal and state courts, Mr. Smith has no income from which his negative net worth could be reduced, or from which harsh and unjustified sanctions of more than $50,000.00 could be paid.

process of law. See Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 1331, 129 L.Ed.2d 336 (1994); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). The Colorado Supreme Court also abdicated its power and responsibility under Article VI, Section 3 of the Colorado Constitution to issue writs of habeas corpus, and suspended the privilege of the writ of habeas corpus, in violation of Article VI, Section 3 and Article II, Section 21 of the Colorado Constitution and Article I, Section 9 of the Constitution of the United States.

By issuing his (March 12, 1998) order of dismissal dismissing Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254 without holding a hearing or addressing the issues and arguments raised by him therein, Judge Daniel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law, including his due process right to a fair and impartial decision-maker.[11]

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[11]On May 2, 1996, the three-judge disciplinary panel of the United States District Court for the District of Colorado issued its order "strongly" admonishing Mr. Smith for allegedly

See Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S.

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practicing law in the District Court in violation of its (February 10, 1995) suspension order, and threatening to cite him for contempt of court "if he continues to practice law in this District." This order was based on a complaint filed against Mr. Smith by United States District Judge Wiley Y. Daniel with the Committee on Conduct of the United States District Court for the District of Colorado. In his complaint, Judge Daniel alleged that Mr. Smith "apparently" represented his client in the District Court "notwithstanding the fact that he is unauthorized to practice law before this Court." On this basis, Judge Daniel alleged that "David L. Smith may have acted in an unprofessional manner." Judge Daniel could not be a fair and impartial decision-maker in the present case after filing his unsubstantiated complaint against Mr. Smith with the District Court Committee on Conduct.

593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Arnett v. Kennedy, 416 U.S. 134 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Johnson v. Board of County Commissioners, 85 F.2d 489 (10th Cir. 1996). Judge Daniel also incorrectly found and/or concluded that Mr. Smith was not "in custody" for purposes of filing

his petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. See Jones v. Cunningham, 371 U.S. 236, 240, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) ("in custody" means that the petitioner is subject to "restraints not shared by the public generally"); Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) (continuing government supervision is sufficient for this purpose); Olson v. Hart, 965 F.2d 940, 942-943 (10th Cir. 1992) (probation is sufficient); Zal v. Steppe, 968 F.2d 924, 926 (9th Cir.), cert. denied, 506 U.S. 1021 (1992) (case was not moot since attorney faced possible disciplinary action); DePompei v. Ohio Adult Parole Authority, 999 F.2d 138, 140 (6th Cir. 1993) (revocation of medical license is sufficient); Nakell v. Attorney General of North Carolina, 15 F.3d 319, 323 (4th Cir.), cert. denied, 513 U.S. 866 (1994) (attorney released on own recognizance following contempt conviction was "in custody"); Oyler v. Allenbrand, 23 F.3d 292, 294 (10th Cir.), cert. denied, 513 U.S. 908 (1994) (possible use of conviction to enhance future sentence was sufficient adverse consequence); Santos v. Franklin, 493 F.Supp. 847 (D.C.Pa. 1980) (activation of reservist from ready reserve to active military satisfied jurisdictional requirement of "in custody").[12] In the

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[12]Even adverse collateral consequences of a conviction have been

present case, Mr. Smith is being subjected to restraints not shared by the public generally, including an indefinite suspension from the practice of law in the State of Colorado, in violation of C.R.C.P. 241.7. Prior to reinstatement, he must demonstrate that all sanctions imposed against him by the Tenth Circuit and the District Court have been "satisfied" and that all federal suspensions have been lifted--an impossible task considering the fact that he is still financially unable to pay the more than $50,000.00 in harsh and unjustified sanctions previously imposed

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found to satisfy the "in custody" jurisdictional requirement. See Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Evitts v. Lucey, 469 U.S. 387, 391 n.4, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995) (presumption of collateral consequences is irrebuttable, even in misdemeanor cases); but see Maleng v. Cook, 490 U.S. 488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (per curiam) ("once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it"); Waldon v. Cowley, 880 F.2d 291, 292 (10th Cir. 1989) (civil collateral consequences not sufficient).

against him by the Tenth Circuit and the District Court. Further, the federal judiciary has repeatedly refused to review, rehear, reconsider, amend, modify, vacate, or correct the harsh and unjustified sanctions and discipline imposed against Mr. Smith by the Tenth Circuit, the District Court and their disciplinary panels.[13] These adverse consequences are the direct and proximate result of the Colorado Supreme Court's (March 3, 1997) opinion reciprocally disciplining Mr. Smith based on the Tenth Circuit disciplinary panel's (November 29, 1993) order indefinitely suspending him from the practice of law in the Tenth Circuit. It therefore follows that Mr. Smith was "in custody" for purposes of filing his petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254, and that Judge Daniel committed reversible error by finding and concluding otherwise.

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[13]On February 12, 1998, the Colorado Supreme Court issued its order (a copy of which is attached hereto as Exhibit 6) summarily denying Mr. Smith's verified motion for order reinstating him to the practice of law in the State of Colorado despite the fact that it is impossible to comply with the Colorado Supreme Court's (March 3, 1997) opinion or to file with

V. CONCLUSION

Since Mr. Smith was (at the time of the filing of his petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254) "in custody" in violation of the Constitution or laws of the United States, the district court has subject matter jurisdiction over the action below pursuant to 28 U.S.C. §§ 2241 and 2254. It therefore follows that the district court order dismissing the action below for lack of subject matter jurisdiction should not be summarily affirmed, and that any such affirmance would deprive Mr. Smith of his right to review, on appeal, by the Tenth Circuit pursuant to 28 U.S.C. § 2253, which provides in relevant part as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) . . . .
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

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committee counsel the affidavit required by C.R.C.P. 241.22(b).

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) . . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Since Mr. Smith has made a substantial showing of the denial of numerous constitutional rights, as the result of which the likelihood of success on appeal is high, he moves for the issuance of the certificate of appealability required by 28 U.S.C. § 2253, as well as for an emergency stay of the opinion issued by the Colorado Supreme Court on March 3, 1997 indefinitely suspending him from the practice of law in the State of Colorado. See 28 U.S.C. § 2251. If the emergency stay is not granted, there is a threat of irreparable harm to Mr. Smith, who is being deprived of his constitutional rights, including his Fourteenth

Amendment due process right not to be excluded from the practice law in the State of Colorado on the basis of his inability to pay more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit, the District Court and their disciplinary panels. If, on the other hand, the emergency stay is granted, there is an absence of harm to the Colorado Supreme Court, which has no legitimate interest in enforcing federal court orders imposing harsh and unjustified sanctions and discipline against Mr. Smith. There is no risk of harm to the public interest if Mr. Smith is permitted to practice law in the State of Colorado pending resolution of this appeal. Mr. Smith requests such other and further relief as may be just under the circumstances.

Dated this 15th day of April, 1998.

Respectfully submitted,

David L. Smith
Pro Se Attorney-Petitioner
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

VERIFICATION

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, David L. Smith, hereby verify that the information set forth in the foregoing Verified Response to Order to Show Cause; Motion for Issuance of Certificate of Appealability; and Motion for an Emergency Stay Pending Appeal of the Opinion Issued by the Colorado Supreme Court on March 3, 1997 Indefinitely Suspending Mr. Smith from the Practice of Law in the State of Colorado is true and correct to the best of my knowledge, information and belief.

David L. Smith
Pro Se Attorney-Petitioner
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

Subscribed and sworn to before me by David L. Smith on this 15th day of April, 1998.

Witness my hand and official seal.

_____

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 1998, a true and correct copy of the foregoing Verified Response to Order to Show Cause; Motion for Issuance of Certificate of Appealability; and Motion for an Emergency Stay of the Opinion Issued by the Colorado Supreme Court on March 3, 1997 Indefinitely Suspending Mr. Smith From the Practice of Law in the State of Colorado was placed in the United States mail, postage prepaid, addressed as follows:

Colorado Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Amendment I of the Constitution of the United States provides as follows:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2241 provides as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2253 provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, by the court of

appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254 provides as follows:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective

to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that–

(A) the claim relies on–

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual

determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.